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09/440,340	11/15/1999	ERIC CHRISTIAN HINCE		2831

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EXAMINER

WARE, DEBORAH K

ART UNIT

PAPER NUMBER

1651

DATE MAILED: 03/24/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.
09/440,340

Applicant(s)
Hince et al.

Examiner
Deborah Ware

Art Unit
1651



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Jan 11, 2002 # 2-5-02.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 24-77 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 24-77 is/are rejected.
- 7) ☒ Claim(s) 24-77 is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☒ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____ 6) ☐ Other:

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Claims 24-77 are presented for examination on the merits.

The corrected amendment filed January 16, 2002, and received February 5, 2002, has been received and will be entered. This is the response to the notification of a non-responsive amendment filed October 23, 2001. An extension of time for 3 months to file the instant corrected amendment of January 16, 2002 has been received as well as the appropriate fee therewith.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Objections

1. Claims 24-77 are objected to because of the following informalities: Note 608.01(m) which sets forth proper form of claims wherein it is cited that each claim must be the object of a sentence and each claim begins with a capital letter and ends with a period. Periods may not be used elsewhere in the claims except for abbreviations. See *Fressola v. Manbeck*, 36 USPQ2d 1211 (D.D.C. 1995). Appropriate correction is required to claim 24 (25-77 depend therefrom) wherein the claim 24 sets forth more than one sentence for one claim and uses more than one period for the same claim. Each claim should consist of only one complete sentence and end with a period because no other periods are allowed in the claims with exception of abbreviations which are defined in the specification. Note that the term "One" at lines 4 and 6 should not be capitalized.

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Rejections

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

3. Claims 25 and 27 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. A chemical composition comprising an ammonium-free source of inorganic nitrogen in an amount of from about 0.5 to 7.5% range is not clearly supported by the instantly filed specification nor by the original claimed subject matter. Further, the originally presented claimed chemical composition is neither supported by the specification or original claims for containing a source of complex, biologically hydrolyzable nutrient phosphorus selected from the group consisting of tripolyphosphate, sodium-potassium sodium tripolyphosphate and tetra sodium pyrophosphate.

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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5. Claims 24-77 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The language in the preamble of claim 24, "which provides the capacity to extract and absorb hydrophobic chemical contaminants and to promote the biodegradation thereof," is wordy and does not clearly set forth a composition for biodegradation. Therefore, deletion of the above phrase is suggested and the following language is suggested in place thereof --for biodegradation of hydrophobic chemical contaminants-- . The term "the plant families" lacks antecedent basis in the claim at lines 4 and 6. Therefore, it is suggested to delete "the" before "plant families". Also the numeral "2." is indefinite since there is no number "1." and so it is suggested to change "2." to --b.-- . In addition, at the end of line 5, after "said composition" the following should be inserted --; and-- , in order to make a transition to the next component which would be "b." if the above change of number "2." is made in the claim at line 6. Claims 25-77 are rendered vague and indefinite also because they depend from a rejected base claim and for reasons as follows:

Claim 25 is further rendered vague and indefinite since it is unclear whether an ammonium-free source of inorganic nitrogen is present in given amount because it is not clearly claimed as an amount per se. Thus, it is suggested to insert after "nitrogen" in line 2 --in an amount of--" and also to change the occurrence of "the composition" to --said composition,-- to be consistent with the usage of terms in all of the claims. Also the terminology "comprises one or more" as recited along with Markush Group type language at lines 3-4 is indefinite because

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although said ammonium-free source of inorganic nitrogen is defined by the Markush Group the term "comprises" opens the claim up to other sources which may not be part of the Markush Group and it is unclear what other sources are intended by the terminology "comprises one or more" as recited before the Markush Group. Therefore, the claim 25 is indefinite for this reason as well and it is suggested to delete "comprises one or more" and to insert --is-- in place thereof.

Claim 26 is further rejected for the same reasons as noted above for claims 24 and 25 for usage of similar language and the same changes are suggested.

Claim 27 is further rendered vague and indefinite for the recitation of "said source of complex, biologically hydrolyzable nutrient phosphorous" which lacks antecedent basis in the claim. Claim dependency should be changed to claim --26-- in place of claim 24 as presently set forth. Further, as set forth in claims 24 and 26 the phrase "comprises one or more" should be deleted because the phrase renders the claims indefinite for the same reasons as discussed above and because the claim may not be deemed to be further limiting with respect to the claim from which it depends. Remember that dependent claims although may add another limitation or claim feature they must be further limiting as well. The dependent claim can not be broader than the independent claim or from the claim it depends from.

Claim 28 is further rendered vague and indefinite for failing to clearly set forth that a source of chelating agents are present in a given amount and because the terminology "comprises one or more" as recited before the Markush Group is indefinite because although some of the members are defined by the Markush Group the term "comprises" opens the claim up to other

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members as well and it is unclear what these other members are to be in the claim. Thus, for reasons for usage of the same type of language as discussed above for other dependent claims, claim 28 is also rendered vague and indefinite for similar reasons and usage of the same language. Therefore, it is suggested at line 2 to insert -- in an amount of-- after "chelating agents" and furthermore at line 3 to delete "comprises one or more" and to insert --are-- in place thereof.

Claim 29 is further rendered vague and indefinite for the recitation of "comprising inoculum for one or more microorganisms" since it is unclear what the intended meaning is for the claim with respect to the microorganisms and inoculum. Is the inoculum for the introduction of microorganisms into the composition or is the term intended to be the microorganisms, per se. Specifically, the term can define merely a material for inoculation which does not necessarily include microorganisms, per se. Perhaps the microorganisms are not intended to be added via an inoculum but already in the composition of claim 24 via the plant materials since the microorganisms may be present on the plant materials, per se, and the inoculum is added for the intended purpose of providing a microbial media for them in the composition. Basically it is unclear if the microorganisms are being added to the composition or if they are already present in the composition.. Claim 24 requires no microorganisms and the addition of them in claim 29 is not certain. The microorganism(s) may constitute an "inoculum" per se, but claim 35 further defines the inoculum for microorganisms to be specific biogeo-chemically produced ferric oxides and acid mine drainage wastes. Thus, it is suggested to delete "for" before "one" at line 1 and

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insert in place thereof --containing-- in claim 29. Also it is not clear whether microorganisms or inoculum are present in an amount in the composition in the claim 29. Thus, it is suggested to insert after "microorganisms" in line 2, -- wherein said inoculum is in an amount of-- if the intended language is referring to inoculum and further to delete "whereby" and insert --and-- before "said microorganisms" at line 3. Also the component recited in the Markush Group as "legume-related bacteria" is unclear and it is suggested to delete "-related" and simply state -- legume bacteria--.

Claim 30 is further rendered vague and indefinite since it is unclear whether plant materials are present in an amount of the composition per se. Thus, it is suggested to insert --in an amount of-- after "materials" at line 2 and further after "said composition" at line 2 to also insert --wherein said plant materials are-- . Also "the families" recited at line 3, lacks antecedent basis in the claim. Thus, it is suggested to change "the families" to --plant families--. However, Applicant may also format the language of claim 30 as set forth in claim 24 as well, and in doing so usage of consistent format and language in the claims would be preserved throughout the claims. The latter is suggested for better clarity, however, options are suggested above.

Claim 31 is further rendered vague and indefinite for the recitation of "comprise one or more further" at line 2 since it is unclear as to what is intended by the phrase, perhaps plant materials is intended but this is not really clear. Therefore, it is suggested to delete this language as described herein and insert --are-- in place thereof. In this way the claim clearly reads on what plant materials from the plant family Leguminosae are intended.

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Claim 32 is further rendered vague and indefinite for the same recitation as discussed above for claim 31 and the same change is suggested. However, since only one species is listed and this does not really constitute a group per se, therefore, "the group consisting of" should also be deleted in claim 32.

Claim 33 is further rendered vague and indefinite for the same recitation as discussed above for claim 32 and a similar change is suggested: deletion of "one or more further" at line 2. However, the wordy second component of the Markush Group bridging lines 3-4 is suggested to be listed as the last component of the Markush for clarity. Thus the deletion of "and" before "cotton seed" at line 4, and the deletion and insertion of language "and other fibrous cotton-containing materials produced by the cultivation or processing of cotton" : deletion at lines 3-4 and insertion after "cotton seed" at line 4 respectively, is suggested. The Markush Group should list all of its components as clearly as possible. It is believed by the examiner that the above suggestion is a better format and wording for the Markush Group. Keep in mind these are suggestions. However, the claim is rendered vague and indefinite and these suggestions are set forth to remedy the rejection. Applicant may present alternative changes, and are not limited to any of the above suggestions as a remedy to the rejected claims.

Claim 34 is further rendered vague and indefinite for the recitation of "one or more further" as recited at line 2 for reasons as noted above and already discussed. The remedy as suggested by the examiner is to delete "one or more further" at line 2. However, " plant materials from" as recited at line 3 within the Markush is redundant, duplicative, unnecessary and should

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also be deleted. The terminology "hemp or hops plants" as recited in the Markush Group of which the Markush would read, if changes above are made, as --are selected from the group consisting of hemp or hops plants-- is generally definite even though "or" is used, since it is clear that said plant materials from the plant family Cannabacea must be one of either hemp or hops plants.

Claim 35 is further rendered vague and indefinite for the recitation of "for microorganisms" which lacks antecedent basis and is suggested to be deleted. Also the language "comprise one or more further selected from the group consisting of" is unclear as to what is intended and deletion of "comprise one or more further" is suggested and insertion in its place of --is-- in which to better define what the intended meaning of the Markush Group is to be in the claim. Further, the components listed in the Markush Group are wordy and confusing and the components are suggested to be worded as follows: --ferric oxides, hydroxides and oxyhydroxides--. Thus, as suggested with the rewording above the claim could read as follows: A chemical composition in accordance with Claim 29, whereby said inoculum is selected from the group consisting of ferric oxides, hydroxides and oxyhydroxides; because the language of the presently claimed Markush is wordy and confusing as to the intended components of the Markush.

Claim 36 is further rendered vague and indefinite for the recitation of "comprise one or more" which renders the claim unclear as to what it intended by the recitation of the Markush

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Group in the claim. Thus, the deletion of the language is suggested and insertion of --are-- in its place.

Claim 37 is further rendered vague and indefinite for the recitation of "said plant materials" without any reference to which plant family per se. Thus, it is suggested to insert --of the plant families-- after "said plant materials" at line 1. Further, it is unclear in the claim with respect to "one or more" what is intended and thus, it is suggested that this phrase simply be deleted at line 2.

Claim 38 is further rendered vague and indefinite for the recitation of "the forms of" at line 1 which lacks antecedent basis in the claim. Thus, the deletion of the phrase is suggested at line 1. Also the phrase "one or more" is unclear with respect to what is intended in the claim and thus, it is suggested to change this phrase to recite --in a form--.

Claims 39-43 are further rendered vague and indefinite for the same recitations as discussed above for claim 38 and so the same remedies are suggested.

Claim 45 is further rendered vague for being inconsistent for reciting "the said" before "composition" at line 1 since none of the other claims require "the said" and it is not really necessary. Thus, for consistency throughout the claims the same terms and format are suggested.

Claim 64-65 are further rendered vague and indefinite for similar recitations as discussed above for claim 38. Thus, similar changes are suggested as discussed above for claim 38. Further the deletion of "for microorganisms comprise one or more" in claim 65 and "comprise one or more" in claim 64 are also suggested.

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Claim 66 is further rendered vague and indefinite for failing to clearly recite an amount. Thus, the inserting of --in an amount of-- before "from about" at line 2 is suggested.

Claim 67 is further rendered vague and indefinite since it is unclear with respect to the recitation of "comprises one or more" since it is uncertain what is intended. It is suggested to delete the terms.

Claim 75 is rendered vague and indefinite for the recitation of "is supplemented with a liquid-chemical composition comprising one or more selected" since it is unclear whether the intended composition is nitrates per se, for example, or nitrates as ingredients for a composition. It is suggested to either claim the "liquid-chemical composition" as --a liquid-chemical agent-- or to insert --ingredients-- after "comprising one or more" in line 2, in order to clarify what is intended with respect to "a liquid-chemical composition" supplement.

Claims 76-77 are rendered vague and indefinite since no clear and distinct process steps are set forth. The claims appear to be reciting a use with no clear process steps for carrying out the application. Further, the terms "at a rate" are unclear since it appears to be an effective amount be applied and not a rate, therefore. The processes are unclear as to whether the bioremediation is for hydrophobic chemical contaminants. Also the recitation of "the bioremediation" lacks antecedent basis. Also the term "said chemical composition" should be --said solid-chemical composition-- since "said chemical composition" is considered to lack true antecedent basis. Furthermore, it is unclear how the compositions are being applied or to what it

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is being applied to, and how the bioremediation is being carried out. It is suggested to recite the methods as follows:

A method for bioremediation of hydrophobic chemical contaminants in environmental media comprising:

- a. applying said solid-chemical composition in accordance with Claims 24, 25, 26 27 28 or 29 to the contaminated environmental media in an amount of 0.1 g to 1000 g per kg of the contaminated environmental media,
- b. extracting and absorbing said hydrophobic chemical contaminants from said environmental media; and
- c. biodegrading said hydrophobic chemical contaminants.

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) do not apply to the examination of this application as the application being examined was not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35

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U.S.C. 122(b). Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

8. Claims 24, 29, 33, 36, 68, 72 and 74-76 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over newly cited Pinckard et al. (A).

Claims are drawn to a solid-chemical composition comprising one or more plant materials selected from Leguminosae and Gossypium. Furthermore, the composition may further comprise a bacteria, such as Pseudomonas bacterium, and humic acid. The plant materials are cultivated in-situ within contaminated environmental media and can be subsequently exposed to

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periods of freezing temperatures. Also a method for bioremediation using the solid-chemical composition is disclosed wherein the composition is applied at a rate of about 0.1 g to 1000 g per Kg of environmental media.

Pinckard et al. (also referred herein as Pinckard) teach a solid-chemical composition comprising one or more plant materials selected from Leguminosae and Gossypium. Furthermore, the composition may further comprise a bacteria, such as *Pseudomonas* bacterium, and humic acid. The plant materials are cultivated in-situ within contaminated environmental media and can be subsequently exposed to periods of freezing temperatures. Also a method for bioremediation using the solid-chemical composition is disclosed wherein the composition is applied at a rate of about 0.1 g to 1000 g per Kg of environmental media. Note the abstract and col. 1, lines 30-54; and also col. 2, lines 5-20. Also note col. 5, line 17, lines 27-40, lines 48-65 and col. 8, lines 60-63 and further col. 5, lines 1-5.

The claims appear to be identical to the disclosure of Pinckard and are thus, considered to be anticipated by the teachings therein. The rate of application of the composition is inherent to the teachings of the cited reference wherein none of the plant pathogens survived for more than a few days in a 1 to 1 (vol.) mix of the contaminated media containing the solid chemical composition. Also the freezing temperatures of winter are disclosed as being useful for preparing the solid chemical composition of Pinckard (note col.4, lines 5-10 and col. 5, lines 1-5). Therefore, to subsequently subject the composition in situ to periods of freezing temperatures is inherent to the teachings of Pinckard. Also humic acid is present in humic substrate while the pH

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is desirable to be slightly acidic, at a pH of 6.5 to 6.8. Note col. 4, lines 35-37 and the abstract.

The claims are indeed considered to be anticipated by the teachings of Pinckard. However, in the alternative that there is some difference between the cited disclosure and the claims then such difference is considered to be so slight as to render the claims *prima facie* obvious. One of skill would have been motivated to provide for the composition as claimed based upon the teachings of Pinckard. In the absence of convincing and persuasive evidence to the contrary the claims are considered to be at the very least are considered to be *prima facie* obvious over Pinckard.

9. Claims 24-28, 30-31, 33, 37-40, 42, 44-48, 50-51, 53, 57-60, 72, 74, 66-70, 72 and 74-77 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over newly cited Clarke et al. (B).

Claims are discussed above. However, the claimed composition further comprises many additional ingredients as discussed below and taught by the cited Clarke reference.

Clarke et al. (also called Clarke herein) teach the composition of plant materials, further comprises potassium nitrate, note col. 17, line 61, and sodium hexmetaphosphate, note col. 7, line 57, and chelating agents like EDTA, note col. 7, line 54, and Triticum, note col. 44, line 36, and Glycine spp., note col. 40, line 45, and cotton plants, note col. 39, lines 5-6, and wheat, note col. 44, line 37, and plant materials can be in the form of pellets, note col. 11, line 3, and can be in freeze-dried forms, note col. 21, lines 60-61, and binding agents such as bentonite, note col. 5, line 62 and col. 25, line 66, and the gum plant material can be useful in a drilling mud, note col. 26, lines 20-25, and gum yield produced by suspension cultures of Table 6 of col. 53-54 in these

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cells lines has not yet been optimized by variation of fermentation conditions and media and optimization methods can increase yields, note col. 32, last 5 lines and note col. 33, lines 1-5, and agricultural and cleaning applications are disclosed, note the abstract. The plants are selected from *Gossypium* and *Leguminosae* such as *Glycine* spp. see Table 1.

The claims are identical to the disclosure of Clarke and thus are considered to be anticipated by the teachings of Clarke. The rate of application for agricultural control which is equivalent to bioremediation is inherent to the yields produced as disclosed by Clarke. The gum produced is a plant material of which the gum can be produced by plants of Legume and cotton, etc. In the alternative that there is some unidentified claim characteristic for which provides for some difference between the claims and Clarke then such difference is considered to be so slight as to render the claims *prima facie* obvious over the cited reference. In the absence of convincing and persuasive evidence to the contrary the claims would be rendered *prima facie* obvious because one of skill would have been motivated to select for these plant families to provide the plant material as claimed herein. The plant material is clearly disclosed to be useful for bioremediation in that it has been used as a cleaning and agricultural biocontrol agent. One of skill would have been motivated by the teachings of Clarke to provide for the instantly claimed composition and method therefore. The claims are at least *prima facie* obvious.

10. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible

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harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

11. Claims 24-77 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-32 of U.S. Patent No. 6,423, 531.

Although the conflicting claims are not identical, they are not patentably distinct from each other because plant materials of the plant family Leguminosae and Gossypium as well as Cannabacea and Phaeophyta are required elements of a solid chemical composition and method therefore, as claimed by the patented claims. The patented claims would have provided the motivation to select for the instantly claimed composition as claimed herein this instant case. Therefore, the claims of the instant case are obvious over the patented claimed subject matter.

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12. Claims 24-77 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over the claims of copending Application No. 09/690,419. Although the conflicting claims are not identical, they are not patentably distinct from each other because of those reasons set forth of record.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Applicant's arguments filed February 5, 2002, have been fully considered but they are not persuasive because no terminal disclaimer has been filed in the instant case and it is unclear which case would issue first as a patent since no case has been allowed. Further, each case is distinct and different from the other and possessing different filing dates, and also the claims in the instant case would remain obvious over the copending claims of the other case 09/690,419, noted above, for those reasons of record.

13. All claims fail to be patentably distinguishable over the state of the art discussed above and cited on the enclosed PTO-892 and/or PTO-1449. Therefore, the claims are properly rejected.

The remaining references listed on the enclosed PTO-892 and/or PTO-1449 are cited to further show the state of the art.

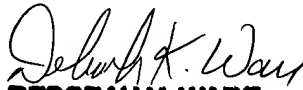
No claims are allowed.

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14. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Deborah K. Ware whose telephone number is (703) 308-4245. The examiner can normally be reached on Mondays to Fridays from 9:30AM to 6:00PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mike Wityshyn, can be reached on (703) 308-4743. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3592.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0196.


DEBORAH K. WARE
PATENT EXAMINER

Deborah K. Ware

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March 6, 2003